Exhibit A

***Briseño v. Conagra Foods, Inc.*,**
No. CV 11-05379-CJC (AGRx) (C.D. Cal.)

Response and Opposition to Objector's Motion for Sanctions

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

ROBERT BRISENO, Plaintiff, vs. CONAGRA FOODS, INC., Defendant.	**Certified Transcript** Case No. 2:11-cv-05379-CJC-AGR

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION HEARING
MONDAY, OCTOBER 7, 2019
1:42 P.M.
LOS ANGELES, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
350 WEST 1ST STREET, SUITE 4455
LOS ANGELES, CA 90012-4565
dhinospaan@yahoo.com

APPEARANCES OF COUNSEL:

FOR THE PLAINTIFF:

TADLER LAW LLP
BY: ARIANA J. TADLER, ATTORNEY AT LAW
One Pennsylvania Plaza
New York, New York 10119
212-946-9300

TADLER LAW LLP
BY: AJ DE BARTOLOMEO, ATTORNEY AT LAW
PO Box 475847
San Francisco, California 94123
212-631-8689

DICELLO LEVITT GUTZLER LLC
BY: ADAM J. LEVITT, ESQ.
AMY E. KELLER, ATTORNEY AT LAW
10 North Dearborn Street
11th Floor
Chicago, Illinois 60602
312-214-7900

MILBERG PHILLIPS GROSSMAN LLP
BY: DAVID E. AZAR, ESQ.
11766 Wilshire Boulevard
Suite 500
Los Angeles, California 90025
213-617-1200

FOR THE DEFENDANT:

ALSTON & BIRD LLP
BY: ANGELA M. SPIVEY, ATTORNEY AT LAW
1201 West Peachtree Street
Suite 4900
Atlanta, Georgia 30309
404-881-7857

FOR THE OBJECTOR M. TODD HENDERSON:

HAMILTON LINCOLN LAW INSTITUTE
BY: THEODORE H. FRANK, ESQ.
1629 K Street NW Suite 300
Washington, DC 20006
703-203-3848

UNITED STATES DISTRICT COURT

LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 7, 2019

1:42 P.M.

- - -

THE COURTROOM DEPUTY: Calling Item Number 3, CV 11-05379-CJC, *Robert Briseno vs. Conagra Foods, Inc.*

Counsel, please state your appearances.

MS. TADLER: Ariana Tadler of Tadler Law on behalf of the plaintiffs.

THE COURT: Hello, Ms. Tadler.

MR. LEVITT: Good afternoon, Your Honor. Adam Levitt on plaintiffs' behalf.

THE COURT: Hello, Mr. Levitt.

MS. KELLER: Good afternoon, Your Honor. Amy Keller also on behalf of plaintiffs.

THE COURT: Hello, ma'am.

MR. AZAR: Good afternoon. David Azar on behalf of the plaintiffs.

THE COURT: Hello, sir.

MS. DE BARTOLOMEO: Good afternoon, Your Honor. A.J. De Bartolomeo on behalf of the plaintiffs.

THE COURT: Hello, ma'am.

MS. SPIVEY: Angela Spivey with Alston & Bird on behalf of Conagra Brands.

THE COURT: Hello, ma'am.

MS. SPIVEY: Hello.

MR. FRANK: Theodore Frank on behalf of the objector Todd Henderson.

THE COURT: Hello, Mr. Frank.

All right. Well, I went through all the parties' briefings, and hopefully you received the tentative order. So I don't know if there's anything the plaintiffs' counsel or the defendant's counsel want to say before we turn it over to Mr. Frank, because I assume he disagrees with the tentative.

MR. LEVITT: Good afternoon, Your Honor. Adam Levitt, once again, on plaintiffs' behalf. As we had this conversation -- or last time here, the first time I was in front of the Court -- I occasionally stutter when I speak. It's not a problem for me; it shouldn't be for you.

THE COURT: It is not.

MR. LEVITT: If anything I say isn't entirely clear, please let me know, and I'll go right back over it.

THE COURT: I'll do that.

MR. LEVITT: So having just received the tentative and reviewed it, as I learned as a very young lawyer, when the wind's at your back, I shouldn't say a whole lot. So I won't at this point.

I simply wanted to say, as Your Honor is aware -- and Your Honor came to this about 80 percent of the way in -- it's been a long road. We filed this case back in 2011. I was saying to my colleagues last night, when we filed it, my son

was less than a year old, and now he's almost five feet tall, which is crazy by itself.

But that being said, as Your Honor saw from our papers and just a review of the record in this case, this was a fight for eight years. We changed the law on ascertainability in the Ninth Circuit. We fought on multiple rounds of motions to dismiss four separate motions to preempt or otherwise stay our case on primary jurisdiction grounds. We prevailed over all of them.

01:45PM We went through two separate rounds of class cert. And after everything -- and then after a court-appointed mediator in -- with the expert help of Magistrate Judge McCormick, we reached a settlement for the proposed class -- or actually the certified classes that gave them 136 percent of what they could have gotten at trial for their monetary damages. We set up a separate fund for a couple of states that had prospective statutory damage claims. And for all of that, after that, we ultimately -- once we got all the relief we could get for the -- for our classes, a larger amount than we could have gotten at trial, we ultimately accepted a mediator's recommendation, after multiple rounds of hard-fought mediation and separate conversations afterwards, of about 50 percent of our fees.

And unlike lots of other cases where some plaintiffs' lawyers -- nobody here settles cases early

after -- without fighting. And I'm sure we'll hear about that in a little bit. We fought this case every step of the way. We got 11 statewide classes certified in a somewhat hostile climate for these kinds of cases and class certificates. So we won at every stage of this case.

01:46PM

And then, after all that, the reward we get for that is having to accept a fee of about half of what we actually put into this case. But the reason we did that is that, once we got as much as we could ever get for the class members, at the end of the day, there was nowhere else to go. We had to accept a fee because we were done. We did our job. There wasn't anything more we could get.

01:47PM

So rather than put the interest of the class members at risk and risk getting a lower amount at trial -- and as Your Honor points out in the tentative, there are risks in every case. And as Your Honor pointed out a number of times, there were lots of risks here -- rather than roll the dice on that and put the interest of the class at risk, which we would never do, it was time to call it a day, accept the mediator's recommendation to settle this case.

01:47PM

So as a result of all of that, I'm going to reserve any time that I have to respond to anything that Mr. Frank may say about the settlement.

And one thing -- one question I had for you in the tentative on page 6 and page 13 of the tentative, you referred

01:48PM

to a management problem. I'm going to guess that you meant a manageability problem under Rule 23, but I don't want to assume anything. So if I could ask Your Honor if that's what Your Honor meant or if there's another sort of management problem that Your Honor was thinking was happening in this case.

THE COURT: I will try to be as specific as I can. And then if you want further clarification, please do so.

When I was listening to your argument -- obviously, if you look at my order, I agree with everything you said. But I would highlight two factors about this settlement. I thought the plaintiffs' counsel did a great job. And I say that because I looked at this case -- although I view the principle of advertising being accurate and marketing being accurate as very important, I just looked at this case -- and I think much differently than Judge Morrow did because I'm not so sure I would have certified any class. I think you had significant problems with proving causation and damages.

Now, with respect to damages, as long as your formula applies to everybody, that shouldn't be grounds to decertify a class. But it's really wrapped into causation. How are you going to prove at this point people bought an item based on a representation that was made years ago, you know, by picking a product off a shelf? I just think it's very, very difficult.

To your point specifically, or your question, "management" is exactly what is the Rule 23. As a trial judge, you know, I'm not a great constitutional scholar or academic. That's not my approach. I look at things, how am I going to put this case on trial? What makes sense? And at the same time, give due process to the defense. Defense has to be able to challenge causation that all these individuals actually bought the product based on the representation that it was 100 percent natural. They've got to do it consumer by consumer.

01:50PM And I didn't -- although, again, I think you got to have your advertising being accurate for the consumers -- and that's where you expect your federal government and your state governments to be zealous in protecting the consumers.

From a private civil litigation, I wouldn't have 01:51PM taken on this case if I were you because it had so many problems. And then if you look at you had to litigate it for eight years, and then the result is that the defendants reasonably changed their advertising, and then that was in connection with, I know, a corporate transaction -- I get that. 01:51PM But you still achieved them taking that advertising down. And then you got people who are going to get some money.

Whereas, if I was handling this case, and I -- I think most of you were here. I said, "We're going to have to tee this up for dispositive motions, and we're going to have to 01:51PM tee it up for, maybe, decertification, or I'm going to start

off with a California class. I'm not going to be litigating in one trial 13 separate classes."

You know, that made sense for purposes of, I guess, settlement, but it did not make sense for purposes of putting on a trial. And I just don't have the resources to have 13 separate trials. I mean, you'd shut me down from all the other important cases that I have. So I'm trying to give you a little more flavor to my comment about management.

Management, from my standpoint, I just -- I don't see how so many classes were certified. And then even with respect to the California class, I think the plaintiffs had significant problems on proving causation and damages. And you got -- part of the settlement, you got that, and you had to fight tough for eight years.

MR. LEVITT: A couple of things: Number one, I don't think I could have made a better argument in support of our settlement than Your Honor just made. Number two, with respect -- just a couple of things and that's it. With respect to -- and since we're at the end of the road, there's no reason to get into a back-and-forth on it. But in terms of having to go to each class member and ask them, that wasn't what our case was about. Our case was about a price premium as a result of the false claim on each label.

So as a result of that, every class member overpaid. Whether or not they relied on it, they overpaid as a result.

That would have ultimately been something that we would have ultimately put to a jury at trial had we gotten there. But it's a moot point now. I just wanted to clarify that it was not going to be a person by person "Did you rely on this."

01:54PM THE COURT: Oh, I know that's not -- that wasn't your intent. But I got to believe the defense were going to say there's a big causation problem here. If this went to trial on the California class, there's a big causation that -- what I guess I'm -- the issue of reliance is did any of these people truly rely on this representation when they purchased this product? I can tell you, I purchase this product all the time, and I remember seeing the "100 percent natural oil." I used it to make waffles with the Bisquick bake, and I used it for other things. I won't bore you. I used it all the time.

01:54PM But how are you going to prove that that representation was material and then that people did it? And it sounds like you have in your mind the pitch you were going to make to me, but I'm here to tell you, as the trial judge, it was going to be an uphill climb is what I'm saying. And my

01:55PM recollection is both plaintiffs and the defense said, "Let's see if we can settle this case before you start to gut our case." That's my words, not your words. But I encouraged you to settle this because, you know, we're going to be doing a lot of work. And at the end of the day, I'm not sure you're going

01:55PM to get anything.

MR. LEVITT: I understand. And as a result of everything that we had accomplished in the case and with Your Honor's assignment of Magistrate McCormick as our mediator, we worked as hard on our settlement as we did for the eight years of our case. And we got it resolved in a way that makes every class member who put in a claim more than whole. So we think it's a strong settlement. We think it's a positive settlement.

01:55PM

We think that Your Honor's tentative frames out some of the risks, frames out some of the efforts we went through in this case. And so as a result of that, we appreciate the tentative. And we hope that, ultimately, when we walk out of here or shortly thereafter, the tentative becomes a final and we all go on our way.

01:56PM

THE COURT: Good enough.

MR. LEVITT: So thank you.

THE COURT: Is there anything else any of the other plaintiffs' counsel want to say before I hear from defense counsel?

01:56PM

MS. TADLER: No, Your Honor. Thank you.

THE COURT: All right.

MS. SPIVEY: Your Honor, on behalf of Conagra Foods, I do have a couple points with the tentative, if I could address --

01:56PM

THE COURT: Please do.

MS. SPIVEY: Page 3 and page 8, the Court goes through to the recovery of the class. On page 3(c), there's an additional fund of $10,000 to compensate those in the classes that submit valid proof of purchase receipts for more than 30. That was actually not capped. The class recovery is not capped. It's just Conagra's contribution that is capped at $10,000.

01:57PM

If you look at the settlement agreement, Section 2.20 and Section 3.1.1.4, both of which make clear that Conagra's contribution's capped, but the recovery of the class is not capped, which is consistent with all the pleadings that the plaintiffs and Conagra have filed for the settlement in this case.

01:57PM

THE COURT: I appreciate that clarification. And this is a question: Do you think I need to change the wording of that? And if so, how would you like it changed?

01:57PM

MS. SPIVEY: I would make it consistent with the settlement agreement language. Section 2.20 and Section 3.1.1.4 are both consistent with one another.

01:57PM

Currently, there's been 247 claimants that have submitted proof of purchase for more than 30 products which represent 349,000 units. That would be a fund of $52,000 roughly.

THE COURT: Okay. So what is the language? I don't have the settlement agreement in front of me.

01:58PM

MS. SPIVEY: I have it right here. (Reading:)

"...an additional fund of 10,000 to compensate all classes that submit valid proof of purchase receipts for more than 30 at 15 cents for each such purchase above 30. Should 10,000 be insufficient to cover such claims, class counsel shall pay the nonfunded claims from fees awarded in this case."

It goes on to say (Reading:)

"Should 10,000 capped fund not be exhausted, the remaining funds will revert to payment of the New York and Oregon state classes."

THE COURT: Okay. And that language -- I write really slowly -- that language is in the settlement agreement?

MS. SPIVEY: Yes, Your Honor.

THE COURT: Okay. And in a lot of these cases -- and I'm sorry, I just focused on the briefs that were submitted -- they ask me to sign off on a judgment, and maybe sometimes there's another order that's issued.

Have you proposed any such judgment or order in this case that you want me to issue?

MS. SPIVEY: We have not, Your Honor. And I think primarily because J&D has not -- all these numbers that you have on the claims that have been made are pre-deduplication. So the J&D has not taken out the duplications, and they have

not run their fraud checks. That would not be done until after final approval is granted.

So the numbers could come down. We don't know when the final numbers will be --

01:59PM MS. KELLER: Your Honor, if I may?

THE COURT: Yes.

MS. KELLER: Class counsel will be happy to submit the order once everything's deduplicated and, also, once everything is verified as well.

01:59PM THE COURT: Okay. So what -- and then you can put in there what you feel is appropriate and we'll give, obviously, anybody a chance to object to whatever you submit before I sign off on it. But I will make the change to this order to have -- make sure that this language is consistent

02:00PM with the settlement agreement language here on page 3. And you said it's on page 8 too.

MS. SPIVEY: Yes, sir. The paragraph starting with "In addition to this award."

THE COURT: Yeah. Yeah. So I'll modify that.

02:00PM And then if you would be kind enough to meet and confer and submit any other documents you want me to issue that are consistent with this order -- such as the judgment or if there's any other order that you want -- that would be great. And then I'll give a few days for anybody to object. And then

02:00PM I will issue those as well.

Is that acceptable?

MS. SPIVEY: Yes, Your Honor.

MR. LEVITT: Yes, Your Honor.

MS. SPIVEY: I do have one more point on page 3 as well. The tentative order says "After the parties reached the settlement agreement, Conagra sold the Wesson brand to Richardsons [as spoken] International." That actually occurred three months before the settlement agreement.

THE COURT: Okay.

MS. SPIVEY: The sale to Richardsons was formalized in December of 2018; settlement agreement is March of 2019.

THE COURT: I see. So you reached an agreement before, but it wasn't finalized until after?

MS. SPIVEY: Correct, Your Honor.

THE COURT: Okay. So was it a tentative settlement?

MS. SPIVEY: There was nothing in writing. Yes, I believe that plaintiffs would agree with me that it was a tentative settlement that we discussed and were negotiating out with Judge McCormick. The settlement agreement had not been signed. It wasn't signed. It was dated March of 2019. The settlement to Richardson was closed in a done deal as of mid-December 2018.

THE COURT: All right. So I'm trying to think how can I make this simpler. What modification do you want on page 3 on that?

MS. TADLER: Your Honor, this is Ariana Tadler for plaintiffs. I'm sure my colleague may have some specific words that she would like included. We actually disagree. We believed we had an agreement in principle at that point.

02:02PM THE COURT: Okay.

MS. SPIVEY: Your Honor, I would say the tentative order doesn't say "agreement in principle." It references "The Settlement Agreement" with caps. That references the document that was signed in March of 2019.

02:02PM THE COURT: Well, how about "Parties reached a settlement in principle"?

MS. SPIVEY: That would be fine with me, Your Honor.

MS. TADLER: No objection, Your Honor. Thank you.

THE COURT: "After the parties reached a settlement

02:02PM in principle, Conagra sold the Wesson brand." Okay.

MS. SPIVEY: Thank you, Your Honor.

THE COURT: Anything else?

MS. SPIVEY: Nothing further on behalf of Conagra.

THE COURT: And do you have any comments to my

02:03PM comments? Because it is your record with respect to -- I thought there were a lot of legal and procedural hurdles that the plaintiffs would have to overcome. Was I speaking out of turn, or was I accurately depicting how you were going to contest causation and damages pretty vigorously?

02:03PM MS. SPIVEY: We definitely agree with Your Honor's

assessment of that. We had planned on filing a motion to decertify the classes, the motion for summary judgment, and then a motion to sever the different state classes and then to transfer them back to their original state, which would have required 11 different trials and 11 different jurisdictions if we did not prevail on the motion for summary judgment, which we feel like we had a good chance of prevailing at.

So we certainly agree with Your Honor's assessment and with the issues with plaintiffs' case.

02:04PM THE COURT: I think there are several recent decisions from the Circuit. I know Judge Kleinfeld was the *Mazza* decision, how a lot of these state subclasses, they really should be tried in the states.

MS. SPIVEY: Correct, Your Honor. We also had the 02:04PM label change in July of 2017. After that label change, there's no evidence that there was a drop in the price that people paid for Conagra's product, the Wesson Oil product, and there was no decrease in sales. So it really belied all allegations of a price premium.

02:04PM THE COURT: And that's helping me recall. I had a lot of issues that -- and I don't know whether Judge Morrow shared those issues with you or not, but I had a lot of issues. And like it or not, I was going to be the judge who was now charged with resolving all of this.

02:04PM MS. SPIVEY: We certainly liked that.

THE COURT: Okay. Well, I appreciate it. It sounds like we're singing to the choir.

Mr. Frank, I think it's probably pretty clear to you, sir. I'm trying to be as respectful as I can, but you have a pretty steep, uphill battle to convince me otherwise.

MR. FRANK: Thank you, Your Honor. It's -- what I'm hearing from you is because the plaintiffs had a weak case, the fact that the class is getting anything is what makes this settlement fair. And I would just simply disagree that that's neither necessary nor sufficient.

If the parties came to you with an $8 million common funds and the attorney said, "We want 87 percent of that," you, I would hope, reject that. And if you didn't, it would be reversible error under *Dennis v. Kellogg*. The parties have an obligation, even if the defendant is settling for more than the case is worth, to share that windfall proportionately with the class. And that's stated in *Bluetooth*, 654 F.3d 935. The fact that the plaintiffs worked very hard for the case is irrelevant to the fairness of the settlement, and that's *HP Inkjet*, 716 F.3d 1173.

It was possible to get the class more money. It's not the case that the class got everything they could have gotten because 99 percent of the class is getting nothing. It was possible to subpoena, say, Ralphs supermarket and get a list of all the consumers who bought Conagra from 2010 to 2017

and distribute checks to them proportionately or otherwise. It was possible to take that $8 million that Conagra is willing to pay and split it, 2 million to the attorneys and 6 million to the actual class. But they didn't do that. Instead, they have a claims process where there's no direct notice to the class.

There's no effort to identify individual class members. And remarkably they structured the settlement so that there's an incentive for them not to tell the class. Because anything that exceeds that $10,000 fund comes out of the plaintiff -- out of counsel's pockets.

They set up the settlement to create a conflict of interest between themselves and their own clients. Because every additional dollar that's going to the class members that exceed the $10,000 fund goes out of their own pockets.

Now, the way they get around this is they set up separate funds. They have one claims-made fund for the class and then a separate attorney fee fund for themselves with clear sailing. Defendants agree not to challenge the fee request. And then any reduction in the fee goes back to the defendants, and that's called a kicker. And that is what makes the settlement unfair under *Bluetooth*, 654 F.3d 935. That's all three elements. Red flags, the Ninth Circuit called them.

You had the disproportionality, which Your Honor pointed out. You have the clear sailing, which whereby the plaintiffs negotiated for themselves an elimination of any

challenge to their fee request. And then any fee request, instead of going to the class, any reduction goes to the defendant. And because of that, 7 million is going to the attorneys, give or take, and less than a million to the class. That's the disproportionality forbidden by *Bluetooth*, forbidden by *Pearson vs. NBTY*, 772 F.3d 778.

Now, they justify it with the injunction, and it's remarkable. The Court says, "Well, the injunction's hard to value," and I would disagree with that. I would say the injunction is very easy to value. It's worth zero because it doesn't require Conagra to do anything. Conagra couldn't violate the injunction even if they wanted to because they don't own Wesson Oil anymore, and it doesn't bind Richardson. So it's the very definition of an illusory injunction, the sort of thing courts routinely reject as a justification for a settlement. And that's Subway's footlong, that's Walgreens shareholders -- many settlements where the parties try to create the illusion of relief to justify a large attorney fee so that they can get a case settled without the defendant actually having to do anything. And it's unfair to the class to ascribe any value to that injunction and permit the disproportion of relief that occurs here.

Now, I'm not saying that it's unfair for Conagra to only surrender $8 million. As the Court pointed out. There are a lot of problems with the settlement. There are a lot.

There's no evidence that there is a price premium. Because after Conagra changed the label, the price didn't drop. But that's what they're basing the value of the injunction on, the very same price premium that defendants dispute. And they're trying to have it both ways. On the one hand, we stipulate that the injunction has value, but on the other hand, we dispute that there is any price premium or any effect from the label change.

02:10PM So we're not saying that the defendants had to settle for 80 million or 15 million or even 8 million and 1 dollar instead of the 8 million they settled for. But with that $8 million pie, there is some obligation under Rule 23(e) as a matter of law to distribute it proportionally between the attorneys and the class. And they have structured the 02:11PM settlement with impermissible clauses to ensure that it would be improperly divided between the attorneys and the class and create the disproportion that Your Honor expressed the concern about.

Now, a claims-made process, I think it's very 02:11PM important to recognize, and the FTC while this case -- while the objection was pending released a study that shows that it's very easy to manipulate how many people make a claim. If you give them direct mail in an envelope, you get claims rates close to 10 percent. If you send them an e-mail, it's 02:11PM 3 percent. And if as happened here, there's no notice of the

class, you get what actually happened here, which is a claims rate of less than 1 percent.

And because of that, the parties, by structuring the claims process, however long it is or however much proof you have to put in or what notice goes to the class, you can determine with actuarial certainty how many claims there will be in advance. And you know when you have a claims-made settlement like this that less than 1 percent of the class is going to make a claim, and that's what they agreed to. And not only did they know that, they were so confident of it, they agreed to act as the insurers for Conagra. If too many people made claims, it would come out of their own pockets.

So for those reasons, that's the argument we would end up making to the Ninth Circuit if the tentative ruling became a final ruling. The settlement's unfair under Rule 23(e), it's unfair under *Bluetooth*. And the conflict of interest presented here by the settlement clause whereby if the class counsel notifies too many class members, they have to pay the additional claims out of their own pocket shows, I think, firsthand the problems with the settlement and the confidence that class counsel had that there wouldn't be that many claims and that they were negotiating the settlement that would benefit themselves at the expense of the class.

I'm happy to answer any questions you have, Your Honor.

THE COURT: No. You've been thorough. I'll give you another chance to respond after I hear from defense counsel, and then I'll give the plaintiffs' counsel --

MS. SPIVEY: Your Honor, the objection, it goes back to what we said in our brief and our submission, it is more than fair to the class members. And there's no evidence and not even any argument that what the class members are receiving is in any way unfair or unreasonable. It's more than generous, as the Court has pointed out. And that's the burden that the objector has to set aside the settlement, and they can't do it. They're not even arguing it. They're not even saying that what the class members received is unfair or unreasonable. He never said that in his briefing or today in front of this Court.

And that is the burden he carries as the objector, to set aside a very fair and reasonable settlement. In fact, this is a generous settlement to the class, as we've already established here. So he hasn't met the burden to set aside the settlement.

THE COURT: These are my words of what Mr. Frank said, so he might disagree with this characterization. But listening to him, I felt he was saying, you know, you have to analyze what's the proportionality between what the attorneys' fees are and then what the class gets. And here the attorneys' fees is, you know, approximately -- what is it? --

MS. SPIVEY: 6.85.

THE COURT: -- 6.85, $7 million, approximately, whereas that's not what the class members are getting. And that the injunction is illusory, there's a lot of questions with that. But, you know, starting off is -- I didn't feel the injunction was illusory.

I just have a recollection that this whole case was impacting your client's business and your client's hope to sell this division in the Conagra/Wesson brand and -- am I wrong about that? That this injunctive relief was a big issue to your client?

MS. SPIVEY: I'm unaware if this case or the injunctive relief had any issue to do with the sale of the brand. Conagra had sold the brand to Smucker's before our first mediation in this case ever happened. And then the sale did not go through because the government killed it. And so the brand remained on the auctioning block.

And as a matter of fact, in all of our federal SEC filings K1s, K2s, I'm not an SEC attorney, so I may get the number wrong, we had -- the Wesson Oil brand held as an asset for sale. So this was always on the auctioning block since the Smucker's sale fell through because of the government.

I'm not the deal lawyer for Conagra, but I was unaware of anything relating to this case or the injunction that would have held up any sale.

THE COURT: But did this litigation -- wasn't that a

carve-out from the deal? In other words, wasn't your client going to have to be responsible for whatever damages, if any, the plaintiffs were able to recover?

MS. SPIVEY: Correct. Because the classes all end in July of 2017 when Conagra took the "natural" claim off the label. Conagra would have generated all the revenue from the sales at issue. The class period would have ended years before the sale was commenced.

So, yes, Conagra would have retained the liability for the damage and did in this case and would be paying here.

THE COURT: Do you agree with Mr. Frank's characterization, that the injunction was really illusory?

MS. SPIVEY: So we disagree with most everything that plaintiffs' expert Mr. Weir has said. We do believe that a lot of his damage models are a house of cards, ready to fall. We have briefed that and are currently briefing it in a couple of cases that we have where Mr. Weir is the plaintiffs' expert.

We did not agree to any evaluation retroactively of the injunctive relief because we don't believe injunctive relief had any retroactive fact. We only agreed to forward-facing conjunctive relief and the evaluation of that.

THE COURT: Okay.

MS. SPIVEY: If I could, one more thing real quick. The plaintiffs' lawyer -- sorry. The objector had said a few times -- it seems to me he was more concerned that we didn't do

direct consumer sales or notification of the class, that we somehow manipulated the claims recovery rate because we didn't send you, Your Honor, a letter saying "You should send this in" or we should just send you a check. We had no way of doing that. Conagra has no direct consumer sales.

02:18PM

So you and no one else in America can go to Conagra's website and buy its products. That's not the way Conagra's business is done. So we didn't have consumer. We didn't know you purchased the product. And we would have had no way of knowing that. Because you might go to a grocery store or order it online from Amazon. We don't know who those people are. So we had no way of giving the plaintiffs a list of all the consumers or potential class members so that they could have sent consumers direct notification of the settlement.

02:18PM

02:18PM

This was not a purpose manipulation on their part or ours to manipulate the claims rate. This is just the way our business is run. We don't have that information to provide.

THE COURT: So not only did you not have the information on who were the purchasers of the product, but then you certainly didn't know why they bought it and whether it had anything to do with the representation that it's 100 percent natural.

02:18PM

MS. SPIVEY: Exactly.

And, Your Honor, we actually pointed out to a survey

02:19PM

that we did -- that we commissioned as part of the litigation. That's fully briefed in all of the class certification documents that show that the "natural" claim was a motivating factor for less than 3 percent of those surveyed. So 97 percent of the people who bought Wesson Oil bought it because their grandmother bought it or because it was a legacy product they bought for decades or for other reasons other than the "natural" claim on the product.

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THE COURT: Mr. Frank argued very eloquently with citation to law that, you know, there has to be some proportionality between what the class members get and what the plaintiffs' attorneys get. And I know plaintiffs' attorneys are anxious to respond to that.

But I would be interested in your response to that because this settlement agreement was agreed to by you. So tell me if Mr. Frank is correct about that. And if not, tell me why not.

MS. SPIVEY: Your Honor, I'll leave it to the plaintiffs' lawyer to tell you what the case law says in this area because, quite frankly, I didn't look into the case law all that much in this area. Is there a discrepancy between what the class is getting and what the plaintiffs' lawyers are getting? Yes. Is it justified? That's for the Court to decide.

I don't really know the case law, so I can't stand

up here, like Mr. Frank, and cite off the top of my head all the cites that would support that.

THE COURT: Okay. You've answered my questions.

MS. SPIVEY: I would say one more thing that we would point out. Conagra, in negotiating this settlement, was very concerned about -- we called them buckets -- what each bucket of settlement was and how much money went to each bucket. Conagra never said, "Here's $8 million. You guys figure out how you want to divvy it up."

That's just not the way this happened, and that would not be anything Conagra would ever entertain here. We don't want to incentivize plaintiffs to file what we believe to be frivolous lawsuits against us. And if we gave them ten times the purchase price of any product, we're setting a precedent that would be very detrimental in incentivizing frivolous labeling claims.

So this was not a situation where we said, "Here's $8 million. Go figure out what you want to do with it." This was negotiated painstakingly for each bucket, I would say, as we called it, during the settlement negotiation process.

THE COURT: And I have my own understanding of why, and I know this was a recommendation by Judge McCormick, who I have great respect for. But tell me why you did this. Why did you agree to this settlement where you would have these individual buckets, and then you have approximately $7 million

going to the attorneys?

MS. SPIVEY: Your Honor, I'm not at liberty to disclose Conagra's motivation for wanting to enter into a settlement here. That's protected by the attorney-client privilege.

02:22PM

I think the obvious reasoning is we didn't own the brand anymore. We don't own the brand. We have no intention of buying the brand back. So we're fighting over something that just doesn't impact us anymore. And at some point, that just didn't make much sense.

02:22PM

THE COURT: And I assume -- and I respect that. I apologize if, in any way, I was trying to invade the attorney-client privilege. That was the last thing I was trying to do. I was just trying to understand it for the record to defend approving this.

02:22PM

The litigation cost must have been enormous on your client's behalf, especially if you were talking about then decertifying these classes and sending them back to state court.

02:22PM

MS. SPIVEY: We were facing a lot of litigation costs. Why -- I think we would have and could have prevailed on a motion to sever and then a motion to transfer. That would have been a huge victory for us. It also came at a cost for us because that also throws us trying 11 different state classes in 11 different states. It causes us to argue motions for

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summary judgment in 11 different states under 11 different state laws. So while I think we could have and would have prevailed on the merits, it was with a cost. I'm not free. So Conagra was definitely paying legal fees.

02:23PM THE COURT: It is a question, it is not an order, and you'll probably shut me down, but can you give me any general estimate on how much your client spent on this litigation?

MS. SPIVEY: Substantially less than the plaintiffs 02:23PM have claimed that they spent. That could be a reflection of me sitting by myself and the plaintiffs' lawyers having five attorneys sitting at the table. And that's generally the MO that we've been handling this case under. So our fees and costs are substantially less.

02:23PM THE COURT: But was it over a million dollars that you litigated this over eight years?

MS. SPIVEY: So I really -- we are on different types of alternative fee arrangements with Conagra, so I couldn't quantify that for you.

02:24PM THE COURT: Okay. Thank you.

MR. LEVITT: In terms of what the other side spends, that's always a red herring, for a couple of reasons. Number one, there were three different firms involved for Conagra over eight years. So we -- so to the first firm, the 02:24PM Hogan Lovells firm, whether they got fired, removed,

substituted, I don't know, they spent a lot of time. So I don't know whether that's included.

Second of all, you never know. And we have this conversation in every case, every mediation, a company like Conagra can cut a flat rate deal with their counsel, can cut a discounted rate. Every defense firm wants Conagra's business. So to compare apples to oranges here, it doesn't really move the needle, I don't think, in any real way.

THE COURT: I'm gathering that. So then why did I ask it? Well, I just know in many litigations, but not in this type of litigation, when a plaintiff obtains a recovery -- for example, on a civil rights case, the federal law allows for awards of attorneys' fees. And then I hear defense counsel saying, "How in the world can you give them 1.5 million, $2 million in attorneys' fees? This is crazy."

But then one of the first questions you ask, "Well, how much have you spent litigating this very important civil rights case?" And it's usually more than what the attorneys' fees award is. And I realize that that analogy doesn't work in this case for a lot of different reasons, but I just -- from the record that I have, the number of Complaints, the going to the Circuit on certification -- my God, you must have spent hours just reading Judge Morrow's -- I really --

MR. LEVITT: There wasn't a staple large enough in the courthouse. It was a paper fastener that I've never seen

before.

THE COURT: I've never seen a district court decision that long. And I'm not trying to criticize her, I'm just saying this was a very hard-fought litigation is the point I was trying to make, and that's very expensive to the parties. So I'm just trying to get -- trying to flesh out defense counsel to quantify that expense and burden. Because I know it was one.

MR. LEVITT: Right. And all I'm saying is while it was clearly really expensive for them, it's hard to make an apples-to-apples comparison compared to what we do versus what they do for all sorts of reasons, the fee negotiations with their clients, et cetera.

THE COURT: I agree.

MR. LEVITT: A few things, I'm going to start with a case that Mr. Frank cited, the *Dennis* case, because it's important. In that case the Court said when assessing the merits of an objection to a class-action settlement, courts consider the background and intent of objectors and their counsel, particularly when indicative of a motive other than putting the interest of class members first.

And I'm going to couple that with the tweet that Mr. Frank put up on July 24th, 2019, which I will say he put up before he blocked my partner, Amy Keller, from accessing his tweets where he states:

"This kind of settlement is illegal" -- he says incorrectly in the Seventh Circuit thanks to his organization -- "Will the ND Cal or Ninth Circuit stand for it? Hard to know unless a class member is willing to object against this sort of abuse. But if court did approve, it would be an interesting circuit split."

So for Mr. Frank and what he does in his organization -- when you're a hammer, everything looks like a nail. And every argument he makes comes down to the same thing: plaintiff lawyers should make less money. The settlement's unfair. We should make less money. It should have been a different notice program. We should have made less money. It all boils down to making what we do for whatever reason as cost-effective as possible for us. And that's a fact.

So where we are here -- first of all, the idealogical piece needs to be considered, where the objector is coming from on this. Because it's not from a place in class members' interest here certainly. Because as we pointed out -- and he doesn't make any other actual alternative proposal -- we got more for each claiming class member than they could have gotten at trial. Especially as Your Honor pointed out in Your Honor's courtroom, we wouldn't have even gotten to trial, as Your Honor is saying.

So that being said, there isn't a better alternative. We did better than 100 percent. That's number one. Number two, Mr. Frank doesn't have standing to challenge the fees here because the fees are not coming out of a fund. And that's from the Ninth Circuit. It's 645 F.3d, 1084, 1088 in *Glasser* against *Volkswagen* where it says, in pertinent part:

> "If modifying the fee award would not 'actually benefit the objecting class member,' the class member lacks standing because his challenge to the fee award cannot result in redressing any injury."

So Mr. Frank doesn't have standing to make the arguments he's actually making here.

And, furthermore, this whole question on proportionality, which Mr. Frank tweets as a bright, shiny object, it only matters if it affects the relief to the class, and it does not. There was -- if you gave us zero in fees, the class would not get anything more.

As Conagra's counsel was really clear, they aren't interested in windfalls. That was a hotly negotiated point. And so we got them an amount over 100 percent that Conagra would fully approve. We also put ourselves on the line for anything over 10,000 in the 30-plus claim category that it was going to come out of our pocket.

The other thing, also, if every class member claimed

this was an uncapped -- this was an unkept claims-made situation, Conagra could have been on the hook for tens of millions of dollars more. So for Mr. Frank to even argue that it's this 87 percent number, it was based upon a retrospective evaluation rather than actually looking at what was available to the class members, which is over 100 percent than what they could have gotten at trial.

Then he goes into the issue of class notice. We could have done something else, he said. But interestingly, Your Honor, in his papers, and he filed a lot of them, he did not object to class notice. So for him to come in now and argue about class notice is absolutely improper.

Second of all, our class notice program, which was actually fully vetted and approved by Magistrate Judge McCormick. He vetted competing proposals, and he picked the one that he felt was the most robust and most meaningful with a leading settlement administrator who did a state-of-the-art program.

So even if Mr. Frank had the ability to argue the notice issues this afternoon, which he does not, the notice program -- which this Court approved and was actually chosen, after a vetting process by a federal magistrate judge -- was a fully acceptable program. The fact that there was a small claims rate, it happens. It happens in lots of these kinds of cases. It doesn't mean that it was an ineffective notice

program.

And with respect to Mr. Frank's proposed notice in terms of a subpoena to all grocery stores, it would eclipse the amount of settlement relief altogether. Instead, we worked with our notice provider, the J&D company, to target the class members in ways that had been found to be acceptable in every court.

02:33PM

So moving on from there, and I stated this earlier -- but let me go back to it, and it's in our papers as well -- anytime there's a decoupling of the attorneys' fees in class relief, which happened here, the Lodestar method, as Your Honor points out, is entirely appropriate.

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And as I said, also, paying us less won't give this class anything more. So we're talking about two entirely different things. You could pay us nothing. You could pay us $100 million. The class isn't getting a penny more. It's just the way it is. So to say that the settlement has a defect of some sort because an objector whose sole goal is to make us earn less is saying we should earn less, it is of no moment to a single class member. It is entirely an agenda, an idealogically driven crusade that won't have a positive effect here. All it does -- I know what he wants, Your Honor, to actually do is throw out the settlement.

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So this whole settlement that was after eight years of hard work on all sides of getting it done, changing the

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laws, getting over 100 percent, he wants you to throw it out. And he wants you to throw it out by putting -- put the class members' interest at risk.

And why that's interesting is that in the Southwest Airlines case where I was actually named plaintiff, so I'll front that issue, Your Honor.

02:35PM

At the Seventh Circuit, Mr. Frank argued that because my lawyer failed to disclose to the Court that he and I work on other cases together, I should have been -- he should have been disqualified. And he was saying that because, he argues, because we were putting the class members' interest at risk -- or we had the class members' interest in our hands. There's a duty of candor that he said by failing to disclose, that required a disqualification.

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Now the shoe's on the other foot. Mr. Frank, the only objector he could find from his ongoing Twitter storm was an expert he works with and pays for. So someone who he has worked with, and he has an ongoing financial relationship with, is his only objector in this case, and the only objector in this case.

02:36PM

So I would simply -- I suggest in the midst of all of this and after Your Honor has approved the settlement on its merits for all of the positive things we got in light of all of the serious risks as Your Honor has pointed out, based on Mr. Frank's own arguments on the record in the Seventh Circuit,

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there are grounds for Your Honor to disqualify Mr. Frank and Professor Henderson as an objector -- an objector's counsel in this case, which they failed to advise Your Honor that what was really going on here, they're willing to put the interest of the class members at risk without -- without advising Your Honor of their -- their own financial and business dealings.

02:37PM

"So don't trust me, trust him." That's the argument he made. So we made this qualification argument in our papers. So we would actually reraise it right now, Your Honor, that to the extent that Your Honor would consider Mr. Frank's and Professor Henderson's conduct consonant with what happened in Southwest Airlines, and just going with Mr. Frank's argument in Southwest Airlines, he and Professor Henderson should be disqualified.

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So with respect to the next point on the injunction, the label change alone, as Mr. Weir pointed out, and also while I appreciate Conagra's counsel's gratuitous attack on Mr. Weir, Mr. Weir -- Mr. Weir's expert opinion had been sustained around the country including by Judge Morrow in this case. So the fact that counsel is saying that he believes -- she believes his opinions are based on a house of cards, lots of judges including judges who used to be in this court and the Ninth Circuit have actually certified classes, have approved settlements on Mr. Weir's own work and findings.

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So that being said, Mr. Weir found the value of the label change. And I know that Conagra's counsel says that the change had nothing to do with our case. But if we ultimately went to trial on this, we would put our catalyst argument in front of a jury here and explain that. The facts alone, we filed a case, we litigated the case, classes were certified, they changed the label.

So Conagra can say they changed it for other reasons, and a jury would ultimately figure that out. But to say that it didn't have any value, we disagree. So we do believe that a claim that the injunction is an illusory injunction is simply wrong.

Moreover, as our other expert put forth in his report, the fact is that under normal corporate practice, once a company changes its label, even a successor company, the odds of them changing it back are infinitesimally small. So there was a benefit of that as well. And I think Your Honor recognized there was a value. Maybe not the value we put it all the way, but that Your Honor said there was a value to the injunctive relief.

So I guess, Your Honor, in sum, there is nothing wrong with our settlement, as Your Honor points out in your tentative. In fact, it's a great settlement that resulted from more than eight years of hard lawyering. Great results: A change in the Ninth Circuit's law on ascertainability; 136

percent result for claim and class members; and real change, in the course of this litigation, in Conagra's conduct.

There was nothing to object to here. Mr. Frank and Professor Henderson are being obstacles to justice rather than facilitators of justice. They're grasping at illusory straws to advance an agenda that has nothing to do with this case or our settlement here. And they've withheld vital information about their own relationship from this court and were less than candid with the Court in doing so.

02:41PM So as a result of all that, we respectfully say that Your Honor should enter the tentative and, as I stated, disqualify Mr. Frank and Professor Henderson as well thereby both overruling the objection and mooting it in light of the fact that there won't be an objector anymore, because he doesn't belong here. Thank you.

THE COURT: Thank you.

MR. AZAR: Your Honor, may I supplement one point, which Adam had covered it but went over it quickly on the $10,000 limit.

02:42PM So the 10,000 limit was only for people who submitted receipts for 30 units or over. That, in part, was meant to address your question about causation. So class members were allowed to submit a plain declaration without support if they purchased up to 30 units. And when you think about this as a consumer, you may think about how many bottles

of oil do you purchase per year. So in that respect, there was no incentive, no conflict for anybody who wanted to submit claims for up to 30 units to just submit because there was no comp for the class members. It doesn't affect any dollar amounts.

02:42PM

In contrast, only at 30 units and above -- if people kept their receipts and they wanted to prove causation that they were actually impacted by buying more than 30 units, only they have to submit for the overage over 30 units.

02:42PM

If you want to say, "I bought 31 units, and I want that one extra one that they don't have to provide proof for," then you have to provide the receipts. And that's the difference. And that's why that separate $10,000 was put off to the side by Conagra just for those people who kept receipts

02:43PM

for all of these years who purchased over 30 units who wanted to prove that from a causation perspective.

THE COURT: All right.

MS. SPIVEY: Your Honor, if I could jump in for one second to address it, we disagree that proof of purchase

02:43PM

equates to causation. Causation has to do with what your purchasing motivation was for buying the product, and the proof of purchase does not reflect that.

So we would disagree with the class counsel's point that somehow receipt or proof of purchase equates to causation.

02:43PM

THE COURT: All right.

MR. FRANK: In my previous discussion, I cited *Dennis v. Kellogg*, which is at 697 F.3d 858, and I cited it for the proposition that an 87 percent share of the common funds was, per se, unreasonable because in that case it was a 38 percent, and that's what the Court said was unreasonable.

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The language that Mr. Levitt purports to cite from the opinion I cited appears nowhere in that opinion. And you can look that up and you can judge the rest of the credibility of his arguments which, as we noted in our other filings, are remarkably frivolous. He misrepresents Southwest. He misrepresents our arguments. He misrepresents what I stated. And we document all this in the declarations, Mr. Henderson's declarations, and Docket Number 685.

02:44PM

I won't repeat it here unless the Court has questions about it, but it's all in writing. He doesn't say anything new. It's everything that previously violated Rule 11 and he has the gall to personally attack me and my client here when we have done nothing wrong.

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THE COURT: Well, the last thing I'm trying to do is get people more upset and get more contentious. But the cases you cited me, isn't it significant that those were common fund cases as opposed to this case where the attorneys' fees is paid separately from what's given to the plaintiffs?

MR. FRANK: No, Your Honor. In fact, the issue in all of these cases was that it was a separate fund. In

02:45PM

Bluetooth it was a separate fund, and that was called a red flag, 654 F.3d 935. *Inkjet*, separate fund. *Pearson vs. NBTY*, separate fund. *Redman vs. RadioShack*, 768 F.3d 822, separate fund.

02:45PM The fact that every dollar you reduce the fees of the attorneys does nothing for the class is what makes the settlement unfair under Rule 23(e) because it's the attorneys negotiating a selfish gimmick provision for themselves to prevent a challenge to the fees. And that's why we're not here 02:45PM challenging the fees under Rule 23(h), we're here challenging the settlements under Rule 23(e) because of that provision, because of the disproportionality.

And I don't understand how he says we provided no alternative resolution when, just now, I provided an 02:46PM alternative resolution. If the attorneys want multi-million dollars in attorneys' fees instead of doing the bare constitutional and legal minimum for notice, they could have had additional notice to ensure money gets to the class.

And it's not true that that would outstrip the cost 02:46PM of everything. Because when we won *Pearson vs. NBTY*, it got remanded. And that's what they did because the Seventh Circuit said the attorneys don't get paid unless the class gets paid.

And what do you know? Suddenly the attorneys who said it's too hard to pay the class magically found a way to 02:46PM pay the class. And they did it exactly the way we suggested,

which is you go to the third-party vendors -- you go to Amazon, you go to Ralphs, you go to all these supermarkets that have records of what their consumers buy -- and you either give them notice or you make direct distributions.

02:47PM You can actuarially throttle the number of claims one way or the other, and they chose to throttle it to reduce the number of claims to get Conagra to settle and to maximize the amount that they could -- of the settlement fees that they could get for themselves. And what's going to get delayed here 02:47PM is if there's an appeal and the Ninth Circuit reverses it in two years and says, "You should have considered the *Bluetooth* factors. You should have considered the disproportionality."

And once the settlement gets thrown out, they'll negotiate the same settlement, except the class will get 02:47PM 6 million. They'll find a way to get $6 million to the class to 99 percent of the class that didn't get anything under the current claims process, and the attorneys will get 2 million. And the reason they'll do that is because the same reason Conagra settled now, it's going to cost them more than 02:48PM $8 million to defend the litigation. And so they're happy to pay that $8 million, and they don't care how it's split up. And that's *Staten* [sic], that's *GM Trucks*, that's *Pampers*, that's *Pearson*. Courts recognize this. There's no collusion necessary. It's just two parties acting in their 02:48PM self-interest.

And the self-interest of the defendant is to get out as cheaply as possible. And the self-interest of the plaintiffs' lawyers is to create as much illusory relief as possible to justify as large a fee as possible at the expense of the class. And that inherent conflict of interest is what the Court is here to judge. And it's not the objector's burden, it's the parties' burden to prove the settlement is fair, reasonable, and adequate, and that the disproportion is justified.

02:48PM We already heard from Conagra that they're not going to buy Wesson Oil again. So we know the injunction is worthless because it doesn't require them to do anything. The injunction is worth zero. So that doesn't justify the settlement.

02:49PM I'm happy to answer any other questions Your Honor has.

THE COURT: I appreciate it.

What I'm going to do is take this under submission, and I'll get a decision out tomorrow.

02:49PM MR. FRANK: Thank you, Your Honor.

MS. SPIVEY: Your Honor, can I clarify on the record that I have not represented what Conagra will or will not buy. I am not in-house counsel at Conagra, and so I don't make representations about what brands my client will or will not 02:49PM buy.

THE COURT: All right.

MR. FRANK: The transcript will speak for itself, Your Honor.

MR. LEVITT: An important clarification, Your Honor, as Mr. Frank came roaring up here saying that I miscited the case. He actually failed to look at the Westlaw cite in *Dennis* against *Kellogg*, which I can hand up in Footnote Number 2 of that cite, which is 2013 Westlaw 605- -- my eyes are bad. I'm getting old -- 6055326. In Footnote Number 2, it actually says as a corollary:

> "When assessing the merits of an objection to a class-action settlement, courts consider the background and intent of objectors and their counsel particularly when indicative of a motive other than putting the interest of the class members first."

So as Mr. Frank wanted to say that my argument would somehow -- or the impropriety -- or the improper side of my argument should underscore my other points, I would say it's exactly the opposite. It is actually dead-solid perfect out of an opinion. The fact that, for some reason, he read some other opinion isn't our problem.

So the exact quote is 2013 6055326. If I'm incorrect, I would welcome Your Honor to ask Mr. Frank to come up here and say that I'm wrong again, which would make him 0

for 2.

THE COURT: I think -- I'm just not comfortable. I think I've heard enough.

MR. LEVITT: Okay. Thank you, Your Honor.

02:51PM THE COURT: Okay.

THE COURTROOM DEPUTY: All rise.

(Proceedings concluded at 2:56 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

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)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME COURT REPORTER, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: November 12, 2019

/S/ DEBBIE HINO-SPAAN

Debbie Hino-Spaan, CSR No. 7953
Federal Official Court Reporter

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